

## Appeals, Appeal Waivers, and 2255 Allegations of Ineffective Assistance for Failing to File NOA

- I. Introduction
- II. Defendant's Right of Appeal—Directing an Attorney to Appeal
  - A. The Defendant unequivocally has a right to appeal his case.
  - B. The decision to file a notice of appeal has been called a “fundamental decision” that resides wholly with the defendant.
  - C. If a defendant gives specific instructions for an attorney to file a notice of appeal, an attorney who fails to do so has acted in a manner that is “professionally unreasonable.”
  - D. If a defendant alleges that his attorney failed to follow his instructions and file a notice of appeal, it will trigger an evidentiary hearing.
  - E. So what happens in circumstances where the client has waived their right of appeal and then asks you to file an appeal? You can still file the notice of appeal.
    1. If there are no meritorious issues to appeal. You file an *Anders* brief.
    2. Could You File a Reasonableness Argument Regarding the Sentence and that's really the only viable issue to appeal? No. You essentially have an *Anders* brief on your hands.
    3. You Have a Meritorious Issue and Need to File a Brief. You can try and argue that the issue that you are appealing meets one of the exceptions contained in the appeal waiver.
- III. So the second major pitfall to keep in mind in advising your clients is that requesting that an Appeal be filed is Not Necessarily the same thing as consulting with the Defendant about an appeal. (Consulting with Client about an Appeal)
  - A. The Supreme Court has said that an attorney has a duty under the Constitution to consult with the Defendant about an appeal when 1) there is reason to think that a rational defendant would want an appeal, or 2) that particular defendant reasonably demonstrated to his attorney that he was interested in